PP

v.

AHMAD DAIK ALI

HIGH COURT MALAYA, KUALA TERENGGANU
AHMAD MAAROP J
[CRIMINAL APPEAL NO. 41-41-2003]
28 JULY 2005

CRIMINAL PROCEDURE: *Sentence - Adequacy - Causing death by reckless driving - Fine of RM1,500 upon plea of guilty - Whether manifestly inadequate - Whether deserving custodial sentence - Road Transport Act 1987, s. 41(1), (3)*

ROAD TRAFFIC: *Dangerous driving - Causing death by reckless driving - Appropriate sentence - Fine of RM1,500 - Whether inadequate - Disqualification from holding or obtaining driving licence - Failure to impose disqualification order - Whether magistrate erred in principle - Road Transport Act 1987, s. 41(1), (3) - Road Traffic Ordinance 1958, s. 34A(1)*

WORDS & PHRASES: *'Special reason' - Section 41(3) Road Transport Act 1987 - Meaning and import*

This was an appeal against the decision of the learned magistrate imposing a fine of RM1,500 in default one month imprisonment on the respondent for an offence under s. 41(1) Road Transport Act 1987 ('RTA'). It was not in dispute that the respondent, a driver with the Terengganu Drainage and Irrigation Department, had pleaded guilty to the said charge of causing death by reckless driving, and admitted the facts as presented by the prosecution, namely: (i) that the accident occurred in front of a school at about the peak time when school children were leaving the school for home; (ii) that the respondent's land cruiser went off the road and knocked into the deceased and another school girl; and (iii) that the land cruiser then went into the path of an oncoming car and knocked into it resulting in extensive damage to the car and injuries to its driver and passengers. The Public Prosecutor argued that the sentence imposed was manifestly inadequate, considering that s. 41(1) RTA (as it was then) prescribed a sentence of "a fine not exceeding ten thousand ringgit or imprisonment for a term not exceeding five years or to both". It was further argued that the learned magistrate was wrong in principle in not invoking

s. 41(3) RTA and disqualifying the respondent, since that section called for the offender to be "disqualified for a period of not less than twelve months from holding or obtaining a driving licence, unless the court for special reasons thinks fit to order otherwise". The two sub-sections aside, it was the prosecution's stand that a custodial sentence was called for and warranted by the facts and circumstances of the case.

Held (allowing the appeal, imposing custodial sentence and disqualifying the respondent):

(1) There is nothing in the grounds of judgment and the notes of the proceeding to show that the learned magistrate had adequately considered the element of public interest, which should be foremost in his mind. There is also nothing to indicate that he had taken into account the gravity of the offence and the circumstances of the commission of the offence. The learned magistrate had thus erred in principle in assessing sentence. He had also fallen into serious misdirection by way of non-direction. (paras 23, 24 & 25)

(2) Remarks about the alarming increase in the number of reckless and dangerous driving offences, the growing concern of the legislative and the need for the sentences to truly reflect the concern were made by the courts in authorities such as *Lau Lim Peng v. PP, R v. Downey, PP v. Quek Bak Seng* and *PP v. Zulkifli Omar*. It is this court's view that the situation had not changed for the better on 21 April 1999 when the offence in this case was committed or in 2003 when the respondent was sentenced. Indeed, the growing concern of the legislative could be seen from the fact that the penalty under s. 41(1) of the RTA was enhanced to "imprisonment for a term of not less than two years and not more than ten years and to a fine of not less than five thousand ringgit and not more than twenty thousand ringgit" *vide* Act A 1065/1999 which came into force on 18 April 2000. Clearly, an offence under s. 41(1) of RTA is a serious one and the sentence imposed on the offenders must reflect this. (paras 27, 28 & 29)

(3) The respondent did not explain why the vehicle had gone off the road. Indeed the facts as presented showed that the accident occurred because the respondent was not able to control his vehicle which was driven at high speed. In short, this was not a case of momentary inattention or misjudgment

A on the part of the respondent. This was a case of reckless driving resulting in the death of a person in which public interest demanded that a custodial sentence be imposed. In the result the sentence of RM1,500 fine is set aside and substituted with imprisonment for a term of 12 months. B (paras 31 & 32)

(4) Disqualification under s. 41(3) of RTA is mandatory unless the court for special reasons thinks fit to order otherwise. What in law amounts to special reasons was explained in *Re* C *Kanapathipillay & Ors*, namely, that: "a 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence" and that "a circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' D within the exception". Consequently, the fact that a person is a first offender or that he is required to drive for a livelihood (as was the case here and to which the learned magistrate had given weight when declining to order disqualification) is not a special reason because it is special to the offender and not to E the offence. (paras 35 & 36)

(5) There was nothing in the plea in mitigation advanced by the respondent which could constitute special reasons within the meaning of s. 41(3) of the RTA. Likewise, there was nothing in the facts of the case, and indeed the whole of the appeal F record, that showed that there were special reasons upon which the learned magistrate could justify the decision not to order disqualification. The respondent must therefore be disqualified from holding or obtaining a driving licence, and on the facts a disqualification for a period of two years is G appropriate. (paras 45 & 47)

[Appeal allowed; order accordingly.]

Case(s) referred to:

H *Abu Bakar Alif v. R [1953] MLJ 9* ***(refd)***
Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Goh Kheng Seong v. PP [1992] 1 CLJ 2133; [1992] 2 CLJ (Rep) 408 HC ***(refd)***
Hj Abdul Ghani Ishak v. PP [1981] 2 MLJ 230 ***(refd)***
In re Muniandy [1954] 1 LNS 82 ***(refd)***
I *Krishnan & Anor v. PP [1981] 2 MLJ 121* ***(refd)***
Lau Lim Peng v. PP [1968] 2 MLJ 14 ***(refd)***
Lim Guan Eng v. PP [1998] 3 CLJ 769 CA ***(refd)***

Pazli Tajuddin v. PP [2001] 7 CLJ 111 HC ***(refd)***
PP v. Balasubramaniam [1992] 1 SLR 823 ***(dist)***
PP v. Balasubramaniam [1992] 1 SLR 833 ***(refd)***
PP v. Cheam Liang Kee [1960] MLJ 163 ***(refd)***
PP v. Hiew Chan Fong [1988] 1 MLJ 467 ***(refd)***
PP v. Ishak Hj Shaari & Other Appeal [2003] 3 CLJ 843 FC ***(refd)***
PP v. M Karthiah [1949] 1 LNS 64 ***(refd)***
PP v. Mohd Isa [1962] 1 LNS 130 ***(refd)***
PP v. Quek Bak Seng [1963] MLJ 137 ***(refd)***
PP v. Rudguard [1939] MLJ 56 ***(refd)***
PP v. Sulaiman Ahmad [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447 HC ***(refd)***
PP v. Zulkifli Omar [1998] 1 CLJ 1079 HC ***(refd)***
R v. Ball 35 Criminal Appeal Report 164 ***(refd)***
R v. Clow [1965] 1 QB 598 ***(refd)***
R v. Downey [1954] MLJ 148 ***(refd)***
Re Chan Eow Beng [1961] 1 LNS 103 ***(refd)***
Re Kanapathipillay & Ors [1960] MLJ 243 ***(refd)***
Whittal v. Kirby [1946] KBD 553 ***(refd)***
Yap Liow Swee v. PP [1937] 1 LNS 93 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
Emergency (Essential Powers) Ordinance No 22 of 1970, s. 2(1)
Firearms (Increased Penalties) Act No 37 of 1971, s. 3A
Malacca State Constitution, art. 7(10)
Road Transport Act 1987, s. 41(1), (3)
Road Traffic Ordinance 1958, ss. 34A(1), 36, 37, 74(2)

Road Traffic Act [Sing], s. 67(1)
Road Traffic Act 1960 [UK], s. 1

For the prosecution - Othman Abdullah; DPP
For the respondent - Mazlan Mohd Zain; M/s Legal Aid Centre

Reported by WA Sharif

JUDGMENT

Ahmad Maarop J:

[1] The respondent was charged in the Magistrate's Court Kuala Terengganu with an offence of causing the death of a person by driving recklessly, an offence punishable under s. 41(1) of the Road Transport Act 1987 (RTA). The charge reads as follows:

A Bahawa kamu pada 21.4.99 jam l/kurang 1.00 petang bertempat di km18.2 jalan Kuala Terengganu ke Kuala Berang dalam daerah Marang, dalam Negeri Terengganu, kamu sebagai pemandu M/ Land Cruiser TD 3174 telah memandu kenderaan tersebut di atas jalan raya dengan cuai dan melulu dan telah menyebabkan
B berlakunya kemalangan jalan raya dengan pejalan kaki dan akibat dari kemalangan ini seorang pejalan kaki ini telah meninggal dunia. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 41(1) Akta Pengangkutan Jalan 1987 (Akta 333) dan boleh dihukum di bawah seksyen yang sama.

C **[2]** On 29 April 2003, the charge was read and explained to the respondent. He understood the charge against him. He pleaded guilty to the charge and he understood the nature and consequences of his plea. Brief facts of the case were given (P1) and documentary exhibits (exh. P2 to P12) were tendered by the
D prosecution. The respondent admitted the facts. The respondent then submitted his plea in mitigation. The learned Magistrate accepted the respondent's plea of guilty and convicted the respondent and sentenced him to a fine of RM1,500 in default one month imprisonment. The Magistrate ordered the particulars
E of the respondent's conviction be endorsed on the respondent's driving licence. However, he did not disqualify the respondent from holding or obtaining a driving licence.

[3] Being dissatisfied with the sentence, the Public Prosecutor
F preferred an appeal to this court. The complaint of the Public Prosecutor was that the sentence was manifestly inadequate and that the learned Magistrate had erred in law in not disqualifying the respondent from holding or obtaining a driving licence under s. 41(3) of the Road Transport Act 1987 (RTA).

G **[4]** At the start of his submission, the learned Deputy Public Prosecutor pointed out that words "cuai dan melulu" were used in the charge. However, he submitted that this had not misled the respondent or affect the conviction. Learned counsel for the respondent did not offer any submission to the contrary on the
H point. In connection with the matter raised by the learned deputy, reference may be made to *Haji Abdul Ghani b. Ishak v. PP* [1981] 2 MLJ 230. In that case the first appellant was convicted of an offence under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970. One of the grounds of the first
I appellant's appeal in the Federal Court was that the charge against him was bad for duplicity as it combined three known

offences by importing the provisions of art. 7(10) of the Malacca State Constitution. This ground was rejected by the Federal Court. In delivering the judgment of the Federal Court, Raja Azlan Shah CJ (Malaya) (as he then was) said at p. 246:

> One trend in judicial opinion that is discernible in the cases cited is that the courts are more ready to impugn a charge as bad for duplicity where it contains more that one offence in the alternative. The case of *Yap Liow Swee v. Public Prosecutor* referred to by counsel on behalf of the 1st appellant is clearly distinguishable in that there were in that case clearly two offences disclosed in the charge as the charge alleged "recklessly or negligently." *The indictment in Reg. v. Clow which arose out of a charge alleging that the appellant had caused the death of a person by driving a motor car at a speed and in a manner dangerous to the public was held not to be bad for duplicity as even if the elements of speed and manner of driving constituted separate offences it was permissible to charge them conjunctively if the matter related to a single incident.* In *Vernon v. Paddon* the issue that arose for determination was whether a charge of using threatening and insulting words and behaviour whereby a breach of the peace was likely to be occasioned, contrary to section 5 of the Public Order Act 1936, was bad for duplicity and it was held that the statutory provision in question created one offence, the essential feature of which was conduct of any sort which was intended to provoke a breach of the peace or whereby such a breach was likely to be occasioned and that in any event even if the section created two offences, it was open to the prosecution to charge them conjunctively since they arose out of a single incident.
>
> In *R. v. George Thomas Johnson* the appellant was convicted under the Prevention of Crimes Act 1871, section 7, with being "... found in certain public places, namely, Elm Tree Road and Circus Road ... waiting for an opportunity to commit an offence ..." The two roads named adjoined one another. On appeal it was contended *inter alia* that the indictment was bad for duplicity in that it was alleged in one count the appellant had committed two offences, one in Elm Tree Road the other in Circus Road. It was held by the Court of Criminal Appeal that the form of the indictment did not in the circumstances prejudice or cause embarrassment to the defence and therefore the indictment was not bad for duplicity. (emphasis added)

[5] In *R v. Clow* [1965] 1 QB 598, which was referred to by the Federal Court in the case of *Haji Abdul Ghani b. Ishak v. PP*, the defendant was charged and convicted of the offence of causing death by dangerous driving on an indictment alleging that he had caused the death of a certain person by driving a motor

car at a speed and in a manner dangerous to the public having regard to all the circumstances. An objection taken at the trial that the indictment was bad for duplicity was overruled. The defendant was fined 250 and disqualified from driving for five years. He appealed against conviction on the ground that the indictment was bad for duplicity. On appeal it was held that on the authorities, even if driving at a speed dangerous to the public and driving in a manner dangerous to the public were separate offences, it was permissible to charge them conjunctively if the matter related to a single incident (in that case the death of the person concerned). In his judgment Lord Parker CJ said:

> Section 1(1) of the Road Traffic Act 1960, is in this form: "A "person who caused the death of another person by the driving "of a motor vehicle on a road recklessly, or at a speed or in a "manner which is dangerous to the public, having regard to all the "circumstances of the case ..." It is said that that subsection lays down three separate offences causing death: (a) by driving a motor car recklessly, (b) at a speed dangerous to the public, (c) in a manner dangerous to the public. This court confesses that free from authority they would be inclined to take the view that the subsection lays down only two offences: causing death by reckless driving, having regard to all the circumstances of the case, and causing death by dangerous driving whether as a result of speed or in some other manner, again in all the circumstances of the case.

[6] His lordship then examined a number of authorities and concluded:

> Accordingly, however illogical it may seem, the line of authority is clear and supported by Lord Coleridge J, Avory J, Humphreys J, and others to the effect that, *even if these are separate offences, it is permissible to charge them conjunctively as in the present case if the matter relates to one single incident, as of course it does in the present case, the death of the unfortunate lady concerned.*

[7] Section 1 of the English Road Traffic Act 1960 was almost similar to the provision under s. 41(1) of RTA 1987. The English version of s. 41(1) of the RTA 1987 (before amendment by Act A 1065/99) reads:

> Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, caused the death

of any person shall be guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[8] The Bahasa Malaysia version of s. 41(1) of the RTA reads:

Mana-mana orang yang memandu suatu kenderaan motor di jalan dengan melulu atau dengan kelajuan atau dengan cara yang, setelah mengambil perhatian tentang segala hal keadaan (termasuk jenis, keadaan dan saiz jalan, dan kesesakan lalulintas yang dijangkakan yang ada atau mungkin ada di jalan itu, adalah merbahaya kepada orang awam, menyebabkan kematian mana-mana orang adalah melakukan suatu kesalahan dan apabila disabitkan boleh didenda tidak melebihi sepuluh ribu ringgit atau dipenjarakan selama tempoh tidak melebihi lima tahun atau kedua-duanya.

[9] Unlike in *Yap Liow Swee v. PP*, in the charge against him, the respondent in this appeal was not charged in the alternative as the charge does not state "cuai or melulu". Admittedly, there was no necessity to include the words "cuai dan" in the charge, as the word "melulu" [recklessly] was sufficient to constitute an offence under s. 41(1) of the RTA, as long as the reckless driving had caused the death of a person. Be that as it may, I do not think that the inclusion of the words "cuai dan" in the addition to the word "melulu" is fatal, because as in *R v. Clow*, the charge in this case relates to one single incident ie, the death of the pedestrian.

[10] Having considered the charge in this case (which was in Bahasa Malaysia), but for the error in including the words "cuai dan", I found the nature and substance of the offence against him remained the same – he was accused of causing death of a person by reckless driving which was an offence under s. 41(1) of the RTA 1987. The charge was therefore sufficient notice to him as to the offence he was accused of. I do not think the accused had been misled or prejudiced by the form of the charge in this case. In my view such an error is curable under s. 422 of the Criminal Procedure Code. Thus, in *Public Prosecutor v. Ishak b. Hj. Shaari & Other Appeal* [2003] 3 CLJ 843, FC even misdirection on standard of proof at the close of the prosecution was on the facts of the case, held curable under s. 422 of the Criminal Procedure Code. In *Krishnan & Anor v. PP* [1981] 2 MLJ 121, FC, a charge under s. 3A of the Firearms (Increased Penalties) Act No. 37 of 1971) against the second appellant, which did not state that the second appellant "may reasonably be presumed to have

known" that the first appellant (the principal offender) had a pistol was held not fatal, although under s. 3A of the Act, an accomplice who is liable for the offence is one who was not only present, but was also "reasonably presumed to have known" that the principal offender was carrying or had in his possession or under his control a firearm. In that case the Federal Court held that one of the rules relating to the framing of charges is that where the law does not give any specific name to the offence with which the accused is charged, it will be sufficient for the prosecution to state in the charge so much of the definition of the offence as will give notice to the accused of the matter with which he is charged. It is not mandatory that a complete definition should be given in the charge.

[11] Reverting to the merit of the appeal, in his submission the learned deputy contended that the sentence imposed by the learned Magistrate was manifestly inadequate and would not serve its purpose. The learned deputy argued that even though the sentence of imprisonment was not mandatory under the provision under s. 41(1) of the RTA existing on the date of the offence in this case, cases decided by the courts showed that heavier sentences had been meted out in cases of the like nature.

[12] The learned deputy urged the court to consider the fact that in this case the vehicle (Land Cruiser) driven by the respondent went off the road (terbabas) and knocked into two school children who were walking on the five-foot way. The learned deputy contended that this was a very serious form of reckless driving. It was further submitted that the accident occurred in front of a school. The learned deputy submitted that a competent driver would be careful and would not drive fast at or near such a place. In this connection, referring to the extensive damage to the respondent's vehicle, the learned deputy submitted that the respondent was driving fast and had lost control of his vehicle. The learned deputy urged the court to pass a more deterrent sentence to serve as a reminder to the respondent and other road users. In support, he cited the case of *Pazli Tajuddin v. PP* [2001] 7 CLJ 111.

[13] Concluding his submission, the learned deputy submitted that in this case there was no special reason to justify the learned Magistrate's decision of not ordering the disqualification of the respondent from holding or obtaining a driving licence. In support he cited the case of *PP v. Hiew Chan Fong* [1988] 1 MLJ 467.

[14] In his submission in reply, learned counsel for the respondent said he was tempted to distinguish decided cases on special reasons, such as *Whittal v. Kirby* [1946] KBD 553. However he did not say how those cases could be distinguished from the case before the court. Instead, he cited the case of *PP v. Balasubramaniam* [1992] 1 SLR 833 and submitted that the burden to establish special reasons was on the respondent. Learned counsel then raised the question that if the burden was on the respondent what was the procedure for the respondent to prove the special reasons when he pleaded guilty to the charge. He submitted that the respondent had no opportunity of informing the court what his special reasons were.

[15] Continuing his submission, the learned counsel for the respondent cited the case of *Goh Kheng Seong v. PP* [1992] 1 CLJ 2133; [1992] 2 CLJ (Rep) 408. In that case it was held that cases of dangerous driving could be divided into two categories – firstly, those in which the accident had arisen through momentary inattention or misjudgement, and secondly, those in which the accused had driven in a manner which had shown a selfish disregard for the safety of other road users or passengers, or with a degree of recklessness. An accused who had been convicted because of momentary inattention or misjudgement and who had a good driving record should normally be fined and disqualified from holding a driving licence for a minimum statutory period. Learned counsel submitted that the respondent's case was in this category (of inattention or misjudgement), because he contended that from the facts of the case there was nothing to show that the respondent was driving in inconsiderate and selfish manner.

[16] Learned counsel also urged the court to consider the totality of the facts of case as presented by the prosecution. Learned counsel submitted that the land cruiser driven by the respondent was over 20 years old and as such could not be driven fast. Learned counsel also submitted that in the facts of the case it was stated that the respondent was driving at a high speed, but what actually was the speed he was driving at the material time was not stated. Further, referring to the injuries sustained by the deceased and the other school girl, learned counsel submitted that the injuries sustained by them were not consistent with a high speed impact. It was therefore contended that the respondent was not driving recklessly, but he was careless and was not driving with due care and attention for a very brief period. Hence, it was

submitted that the custodial sentence prayed for by the prosecution was not appropriate and he urged the court to dismiss the appeal.

[17] The question I have to consider in this appeal is whether the learned Magistrate had erred in principle in imposing the sentence appealed against. The question is whether there was a failure on the part of the learned Magistrate to apply the right principle. (See *Abu Bakar Alif v. R* [1953] MLJ 9). I was also guided by what the Federal Court said in *Bhandulananda Jayatilake v. PP* [1982] 1 MLJ 83 at p. 84:

> As this is an appeal against the exercise by the learned judge of a discretion vested in him, *is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description?* I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst other equally conscientious have thought it their duty to view same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.
>
> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. (emphasis added).

[18] In assessing sentence the court should take into account all considerations relevant to the case including the gravity of the offence, the circumstances surrounding the commission of the offence, the antecedents of the accused, the deterrent effect that punishment is to have, any factor that warrants special attention either in favour or against the accused and above all the public interest. (See *Lim Guan Eng v. PP* [1998] 3 CLJ 769 CA).

[19] In his grounds of judgment the learned Magistrate said in assessing sentence he had taken into account the following factors:

(1) The respondent's plea of guilty.

(2) The fact that this was the respondent's first offence and that he had a clean record.

(3) The background of the respondent.

[20] On the background of the respondent, the learned Magistrate said he considered the fact that on the date of the offence the respondent was 32 years old and that he was a driver working with the Terengganu Drainage and Irrigation Department (Jabatan Pengairan dan Saliran Negeri Terengganu). In the learned Magistrate's view, if a heavy punishment was imposed, it would affect the respondent's position as a public servant. In his judgment the learned Magistrate said:

> OKT di dalam kes ini semasa kejadian berumur 32 tahun dan bekerja sebagai seorang pemandu di Jabatan Pengairan dan Saliran (JPS) Negeri Terengganu. Justeru, OKT adalah seorang kakitangan awam dan juga bertugas harian sebagai seorang pemandu. Jikalau hukuman yang berat dikenakan, sudah tentu ianya akan memberi kesan terhadap kedudukannya sebagai seorang penjawat awam yang terikat dengan Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

[21] Next, the learned Magistrate said he considered the fact that the respondent had shown signs of being remorseful and had promised not to repeat the offence and would be more careful in his driving.

[22] The learned Magistrate concluded by saying that having considered the mitigation of the respondent, he was of the view that a sentence in the form of a heavy fine or custodial sentence would not be appropriate if the purpose was to serve as a reminder to the respondent and to make him remorseful:

> Dengan mengambilkira rayuan mitigasi oleh OKT, Mahkamah berpendapat bahawa hukuman denda yang tinggi ataupun hukuman berbentuk pemenjaraan adalah tidak sesuai dan wajar terhadap OKT jika tujuannya untuk memberi satu pengajaran kepada OKT dan menginsafkannya.

A Oleh yang demikian, setelah Mahkamah meneliti fakta kes, latarbelakang OKT di samping OKT tiada rekod sabitan lampau, Mahkamah berpendapat bahawa hukuman denda RM1,500.00, jika gagal, 1 bulan penjara adalah wajar dan munasabah.

B Tambahan pula, sabitan berkenaan kesalahan ini telah diperintah untuk dicatit pada lesen memandu OKT yang sudah tentu akan membuatkan OKT lebih berhati-hati lagi untuk melakukan kesalahan jalanraya pada masa hadapan. Oleh itu, hukuman yang telah saya kenakan terhadap OKT difikirkan sesuai dengan peruntukan pada ketika itu dan munasabah terhadap OKT.

C **[23]** In my view this was where the learned Magistrate had erred in principle. Other than the plea of guilty, the respondent's clean record and the fact that he was remorseful, the learned Magistrate had only considered the background and circumstances of the
D respondent, which in my view, had a telling effect on his mind and substantially influenced the sentence eventually imposed. The grounds of judgment appears to reveal reluctance on the part of the learned Magistrate to pass a sentence which in his opinion would jeopardise the respondent's position as a driver with a
E government department. I also found that although the learned Magistrate had referred to a passage from *PP v. Sulaiman b. Ahmad* [1993] 1 MLJ 74, in which the element of public interest was mentioned as a factor which must be considered, there is nothing in the ground of judgment and the notes of the
F proceeding to show that he had actually adequately considered the element of public interest. Indeed, the element of public interest should be the first and foremost in his mind (see *R v. Ball* 35 Criminal Appeal Report 164, *Abu Bakar b. Alip v. PP* [1953] MLJ 19, *Lee Guan Eng v. PP*). The learned Magistrate again had
G erred in principle.

[24] I also found nothing in grounds of judgment or the notes of the proceeding in the lower court to indicate that the learned Magistrate had taken into account the gravity of the offence and the circumstances of the commission of the offence. This is
H another instance of serious misdirection (in the form of non-direction) on the part of the learned Magistrate.

[25] In the light of what I have alluded to above, this is a clear case where the lower court had erred in principle in assessing
I sentence warranting an interfere by this court.

[26] The next question is – was the sentence manifestly inadequate in the circumstances of the case. If so what should be the appropriate sentence? A

[27] The offence of causing death by reckless or dangerous driving under s. 41(1) of the RTA (formerly s. 34A(1) of the Road Traffic Ordinance 1958) even before being amended by Act A 1065 of 1999 was a serious offence. The court viewed such an offence very seriously. This was demonstrated in *Lau Lim Peng v. PP* [1968] 2 MLJ 14, a case decided about 37 years ago. In that case the appellant was convicted of an offence of causing death by dangerous driving under s. 34A(1) of the RTO by the Sessions Court and was sentenced to a fine of RM1,000. He appealed against the conviction and the sentence. The Ipoh High Court dismissed his appeal and in exercising its powers of revision, enhanced the sentence to six month's imprisonment. In his judgment, the learned judge referred to *R v. Downey* [1954] MLJ 148 and *PP v. Quek Bak Seng* [1963] MLJ 137. In *R v. Downey*, the sentence of a fine imposed on *Downey* by the Lower Court was enhanced to a sentence of five months' imprisonment. In *R v. Quek Bak Seng*, the sentence of RM600 fine against the accused, who was also a first offender, was enhanced to a sentence of six months' imprisonment. His lordship next referred to the case of *PP v. Rudguard* [1939] MLJ 56 and said at p. 15: B C D E

> There is also a rather earlier case, the case of *Public Prosecutor v. Rudguard*, in which Terrell Ag. CJ, took into consideration the fact that the accused had already stood his trial once, and had a clear record, and made no effort to evade his responsibilities, and also the fact as stated by the learned magistrate that at that early time this type of offence was not prevalent. But in spite of all these factors, Terrell Ag. CJ, nevertheless altered the sentence of a fine to one of six months' rigorous imprisonment. F G
>
> Now *Rudguard*'s case, *supra*, was decided in 1939 when traffic was relatively light, and I think I am not wrong in saying that at that time in Perak there would be less than 10,000 cars. Since 1939, since in fact after the war, and after the restrictions caused by shortages were removed, traffic has increased enormously without there being any corresponding increase in the size of roads. Clearly, our roads are rapidly becoming totally inadequate for the number of cars that are being licensed for use on the road. And it is also a fact that not only has the number of cars and lorries increased but their size, power, and efficiency have also increased. If in 1950 it could be said in England that they were H I

A trying to squeeze a quart of traffic into a pint of road, how much worse is the position in Malaya today where the main trunk road in Western Malaya is still for single lane traffic either way. In all the circumstances, it behoves everyone in charge of a motor vehicle, be it a big or a small one, to drive with care, with this proviso, that the bigger the vehicle the greater the care that should be exercised.

Furthermore, it is also well known that there has been a considerable increase in the number of accidents involving motor vehicles, and in particular motor-lorries. The Legislature has acted to limit the number of accidents. Whereas previous offences of causing death by a rash or dangerous act were punished under section 304A of the Penal Code, which provided for a maximum sentence of 2 years or a fine, or both, the Legislature had since deemed it fit and proper to increase the sentence for such offences now punishable under section 34A of the Road Traffic Ordinance to a term of imprisonment not exceeding 5 years or to a fine not exceeding RM3,000, or to both such imprisonment and fine.

The learned president, with respect, seems to me to have not only disregarded pronouncements from the Bench of the High Court by my predecessors and my brother Gill, but to *have also ignored the fact the Legislature has regarded with growing concern the increase in the number of serious driving offences.* I am always loath to disturb sentences imposed by magistrates and presidents, but in all the circumstances of this case, it appears to me that I will be failing in my duty if, having come to the conclusion I did that the sentence was manifestly inadequate and that the discretion vested in the president was not judicially exercised, I fail to revise it.

[28] Similar remark about the alarming increase in the number of reckless and dangerous driving offences and the growing concern of the legislative about them and the need for court sentences to truly reflect this concern, was made some 30 years later in *PP v. Zulkifli Omar* [1998] 1 CLJ 1079, where Vincent Ng J said at p. 1091:

It is not possible, it needs hardly to be said, to say in advance what the proper sentence should be in any particular case. *However, the duty of the court is to reflect the concern of Parliament and also, which is sometimes forgotten, to reflect the concern of the public about these matters.*

There is thus the need for the lower courts to demonstrate a greater inclination to utilise the full range of the severity of sentence open to them by statute to impose. And, if more condign punishments could be meted-out in appropriate cases, to

fit the gravity of the offence, it would obviate the necessity for introducing the inflexible legislative minimum or mandatory sentence, which would remove the discretion of courts at the expense of justice in the long run. Be that as it may, the ensuing controversy over the learned magistrate's decision in this case has demonstrated that, *on sentencing of traffic offenders, the lower courts would have to move with the times or be mowed by a chorus of adverse public opinion. The sentences passed should articulate a response to the growing unease over the phenomenal rise in such offences.*

Hence, as, under the principle of "judicial notice" (see *Pembangunan Maha Murni Sdn. Bhd. v. Jururus Ladang Sdn. Bhd.* [1986] 2 MLJ 30, *Lee Chow Meng v. PP* [1976] 1 MLJ 287, *Lim Kong v. PP* [1962] 28 MLJ, *Yong Pak Yong v. PP* [1959] 25 MLJ and *PP v. Choo Teck Heng* [1960] 26 MLJ) judges are enjoined to import into their deliberations on questions they have to decide, their knowledge of common affairs of life. In the current appeal this court must not wear blinkers and fail to take into account the new realities on road use and behaviour in our country – all the more so as such realities are backed up by hard facts and figures. According to a report by the Economic and Social Commission of Asia Pacific (ESCAP), Malaysia has the third highest accident rate in the world and the highest accident fatalities in the world – indeed, for five consecutive years from 1992 to 1996 - with a fatality rate of 8.28 for every 10,000 cars on the road as compared to Finland's 1.80 for every 10,000 cars.

[29] In my view, the situation had not changed for the better on 21 April 1999 when the offence in this case was committed or in 2003 when the respondent was sentenced. Indeed, the growing concern of the legislative could be seen from the fact that the penalty under s. 41(1) of the RTA was enhanced to "imprisonment for a term of not less then two years and not more than 10 years and to a fine of not less than five thousand ringgit and not more than 20 thousand ringgit", *vide* Act A 1065/1999 which was effective from 18 April 2000. So clearly, an offence under s. 41(1) of RTA is a serious one and the sentence imposed on the offenders must reflect this.

[30] From the facts presented by the prosecution, the accident occurred in front of a school at about the peak time when school children were leaving the school to go home. From the facts which were admitted by the respondent, at the material time, the respondent's land cruiser went off the road and knocked into the deceased and another school girl. The Land Cruiser then went into the path of an oncoming car No Proton 729 and knocked

into it resulting in extensive damage to the latter. In the accident, the driver of the Proton car and his wife suffered injuries. Another passenger in the car fractured his left leg in the accident.

[31] The respondent did not explain why his vehicle had gone off the road. Indeed, the undisputed facts presented by the prosecution also revealed that the accident occurred because the respondent was not able to control his vehicle which was driven at a high speed.

[32] Having considered the circumstances as to how the accident had occurred, I regret to say that I was unable to agree with learned counsel's submission that this was a case of momentary inattention or misjudgement on the part of the respondent warranting only a sentence of a fine. In my judgment this is a case of reckless driving resulting in the death of a person, in which the public interest demanded that a custodial sentence be imposed. I do not think that any of the mitigation factors considered by the learned Magistrate could override this demand of the public interest for a custodial sentence in this case to serve as a reminder to the respondent and other drivers that causing death by reckless driving is a serious offence. In the result I set aside the sentence of RM1,500 fine imposed by the learned Magistrate and substituted it with the sentence of 12 months imprisonment affective from 13 October 2004.

[33] I will now deal with the question whether the learned Magistrate had erred when he did not disqualify the respondent from holding or obtaining a driving licence.

[34] The provision relating to disqualification of a person from holding or obtaining a driving licence upon conviction of an offence of causing death by reckless or dangerous driving was provided in s. 41(3) of the RTA. Before being amended by Act A1065/99, which came into effect on 18 April 2000, the section reads:

> A person convicted under this section shall, **unless the Court for special reasons thinks fit to order otherwise** and without prejudice to the power of the Court to order a longer period of disqualification, be disqualified for a period of not less than twelve months from the date of the conviction from holding or obtaining a driving licence.

[35] So, disqualification is mandatory unless the court for special reasons thinks fit to order otherwise. Somewhat similar phrase is also found in the provision under s. 36 of the Road Traffic Ordinance 1958 which provides that the court shall (unless for any special reasons it thinks fit to order otherwise) order particulars of any conviction under that section to be endorsed on any driving licence held by the person. This is in relation to the offence of driving without due care and attention. Similarly, s. 37 of the RTO 1958 provides that a person convicted under that section shall, unless the court for special reasons thinks fit to order otherwise, and without prejudice to the power of the court to order a longer period of disqualification, be disqualified, for a period of not less than twelve months from the date of the conviction, from holding or obtaining a driving licence. This is in relation to the offence of driving while under the influence of drink or drugs. Similar provision is also found under s. 74(2) of the RTO in relation to an offence of driving a vehicle without the vehicle being insured against third party risk.

[36] What in law amounts to special reasons was explained in *Re Kanapathipillay & Ors* [1960] MLJ 243, where Adams J said:

> In *Whittall v. Kirkby* ([1947] 1 KB at p. 201) the Court of Criminal Appeal adopted the test applied in the Northern Ireland case of *R v. Crossan* ([1939] NI 106) as to what in law amounted to a special reason. This test is as follows:
>
> > *A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence.* It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. *A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception.*
>
> *It follows from this that this limited discretion can never in any circumstances be exercised for a general reason since 'special' is the antithesis of general.* The fact that a person is a first offender or that he has not committed a motoring offence for many years are therefore reasons of the most general character and cannot be special reasons. The fact that a person is required to drive for his livelihood or requires his vehicle for his business is not a special reason because it is special to the offender and not to the offence.

What facts constitute a special reason is a matter of law. If the court exercises its power of not endorsing or not suspending a licence for special reasons, the court must state what the special reasons are which lead the court to exercise it. This was decided in *R v. Recorder of Leicester, Ex parte Gabbitas* [1946] 1 All ER 615.

[37] Thus, financial hardship to the offender *(Whittall v. Kirby; Reay v. Young & Anor)* or that the offender knew of no other means of earning his livelihood *(Public Prosecutor v. M. Karthiah)* or that the effect of the disqualification must necessarily and consequently deprive the offender of his livelihood or occupation *(Re Chan Eow Beng; Public Prosecutor v. Teoh Gaik Beng; Public Prosecutor v. Chuah Khay Soon; In re Muniandy)* or that the offender was a poor man and would have difficulty to get to his work *(Public Prosecutor v. Mohd. Isa (albeit obiter))* is no special reason within the meaning of s. 74(2) of the Road Traffic Ordinance 1958 to justify non-imposition of the disqualification.

[38] Before considering whether there were special reasons in this case, I must first deal with another point raised by learned counsel in his submission. As I have stated elsewhere in this judgment, learned counsel pointed out that in *PP v. Balasubramaniam* [1992] 1 SLR 823, the Singapore High Court held that the onus of proving "special reasons" for not ordering disqualification is on the defendant on the balance of probabilities. Learned counsel did not then go on to submit that in this case there were special reasons to justify the decision not to disqualify the respondent. Instead, he submitted that when a defendant pleaded guilty (as in this case) there was no procedure provided for him to discharge that burden. He then questioned that if there was no such procedure provided how could the defendant discharge that burden? He ended his submission on this issue by contending that in this case the respondent had no opportunity of informing the court what his special reasons were.

[39] In *PP v. Balasubramaniam* [1992] 1 SLR 822, the respondent pleaded guilty to a charge of drunken driving under s. 67(1) of the Singapore Road Traffic Act (Cap 276). In mitigation counsel for the respondent submitted that on the day in question the respondent had consumed only 2 glasses of draft beer followed by one double peck of whiskey and that unknown to him, when he had gone to the toilet, one of his friends had "spiked" his whiskey with brandy. A conviction for that offence carried a compulsory disqualification from holding or obtaining a

driving licence for a period of not less than 12 months from the date of conviction, "unless the court for special reasons thinks fit to order otherwise." The learned trial Magistrate imposed a fine of RS1,200 but did not order a disqualification as he found that there were special reasons for not ordering a disqualification. The Public Prosecutor appealed against the failure to order a disqualification. The High Court held that the onus of proving 'special reasons' was on the respondent on the balance of probabilities that it was the additional alcohol of which he was unconscious that put him over the limit. It was also held that when a defendant seeks to prove 'special reasons' for not ordering disqualification on a drunken driving charge, it is essential that evidence of all relevant facts and surrounding circumstances in respect of the defendant and of the adding of additional alcohol to his drink, both as to nature and quality, be placed before the court. It was further held that unless a laymen can reliably and confidently say that the added alcohol must explain the excess of alcohol in the defendant's blood, medical or scientific evidence must be called as well to explain it. Failure to do so can result in the court holding that the defendant has not discharged his burden of proving 'special reasons'. So, whilst the provision relating to 'special reasons' in *PP v. Balasubramaniam* is similar to the 'special reasons' provision in the appeal before me, the facts and circumstances of the case in *PP v. Balasubramaniam* are different from the case before me. In *PP v. Balasubramaniam*, the charge was drunken driving and the nature of the explanation which was advanced on behalf of the respondent as special reasons, had raised a number of questions which were left unanswered. This is clear from the judgment of the High Court at p. 825:

> I would pause here to note that no mention was made in the mitigation plea to the learned magistrate exactly how much brandy had been poured into the respondent's whiskey; whether it was neat brandy that was poured into the respondent's whiskey or brandy which had already been mixed with water or some other mixer like ginger ale or other mixers people sometimes mix with brandy before drinking it; whether the respondent himself was drinking his whiskey neat or whiskey mixed with water or some other mixer like soda; whether the respondent had taken a meal or whether he was drinking on an empty stomach. As will be seen later, these details are extremely significant to the plea of

A mitigation in this kind of case a propos whether there are special reasons for not ordering disqualification. I would also note that the word "spiked" is learned counsel's word which he used throughout his address to me and before the learned magistrate as well.

B **[40]** In my view the judgement in *PP v. Subramaniam* is peculiar to the facts and circumstances of that case. I do not think that the procedure of proving special reasons recommended in that judgment must be applied in all cases relating to driving offences where the defendants plead special reasons in urging the court not C to disqualify them from holding or obtaining driving licences. This seems clear to me from the judgment in that case at p. 826:

All too often in our courts, the plea of mitigation is the 'cinderella' of the trial and even less than that where a plea of guilty is D entered. Rarely, if ever, do defence counsel call evidence to support a plea in mitigation; they make do with such mitigating evidence that may have come out at the trial or rely on statements from the bar in the hope that prosecuting counsel will not challenge them. *That may well do in the ordinary type of criminal case, but when a defendant seeks to prove special reasons, for not ordering* E *of Lord Widaerv, that it is most essential that evidence of all the relevant facts and the surrounding circumstances both in respect of the defendant and of the adding of the additional alcohol to the drink of the defendant, both as to nature and quality, is placed before the court,* and unless a layman can reliably and confidently say that the added F alcohol must explain the excess of alcohol in the blood of the defendant, medical or scientific evidence must be called as well to explain it. Failure to adopt this course can well result in the court holding that the defendant has not discharged the burden of proving the special reasons.

G **[41]** The emphasis was on drunken driving. Thus, in my view special reasons can still be pleaded in plea in mitigation in the ordinary type of criminal case as well as in a case of causing death by reckless driving as in the case before me.

H **[42]** So what should the court do in this case? This brings me back to *Re Kanapathipillai*, where in his judgment at p. 245, Adam J said:

What the Magistrate should have done in the present case having convicted the defendant was to look at the facts and then to have I *decided if those facts or any of them amounted to a reason special to the offence to enable him to exercise the limited discretion given to him not to order the endorsement of the defendant's driving licence.* The High

Court will not interfere if the convicting court properly and judicially directs itself on this matter even though the High Court would have decided the matter differently if sitting as a Court of original jurisdiction.

I have considered the facts of this case and I can find nothing in the facts which constitute a special reason to enable a Magistrate to exercise the limited discretion given to him by the Road Traffic Ordinance for not ordering an endorsement.

[43] In my view, apart from the facts, the learned Magistrate should also consider the plea in mitigation in determining whether there are special reasons for not ordering disqualification of the respondent from holding or obtaining a driving licence.

[44] From the record of appeal in this case, I do not find anything to show this had been done by the learned Magistrate. If his decision not to disqualify was based on special reasons, then he must state what the special reasons were in his ground of judgment (see *Re Kanapathipillai*). Nothing of that sort was stated by the learned Magistrate in his ground of judgment. Indeed there is nothing in the record of appeal to explain why he decided not to disqualify the respondent. This in my view is a serious misdirection on his part.

[45] Earlier, I have set out various factors in mitigation considered by the learned Magistrate. I found nothing in the plea mitigation advanced by the respondent which could constitute special reasons within the meaning under s. 41(3) of the RTA and as explained in the authorities which I have adverted to. I have also considered the facts of this case and the whole of the appeal record and I did not find anything which could constitute special reasons within the meaning under s. 41(3) of the RTA as it existed then. So the respondent must be disqualified from holding or obtaining a driving licence. The question is how long should the respondent be disqualified?

[46] It has been said that it is disqualification which the motorist fears rather than a fine. Disqualification serves a double purpose, in that it is firstly, the punishment most feared by the motorist and therefore the most effective deterrent, and, secondly, it keeps the careless or dangerous driver off the road for a period and does that practical amount of good (see *PP v. Cheam Liang Kee* [1960] MLJ 163, per Rigby J at p. 164, quoting the then Lord Chancellor of England in his address to Magistrates in England).

[47] In my judgment disqualification for a period of two years from 13 October 2004 is appropriate in the circumstances of this case.

[48] In the upshot, the appeal is allowed. The sentence of RM1,500 fine in default one month jail is set aside and substituted with the sentence of 12 months imprisonment from 13 October 2004. The respondent is also disqualified from holding or obtaining a driving licence for a period of two years from 13 October 2004. The particulars of the conviction in this case shall be endorsed on the driving licence of the respondent. The fine of RM1,500 if paid should be returned to the respondent.